NO. 46100-5-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

Stericycle of Washington, Inc.,

Appellant,

v.

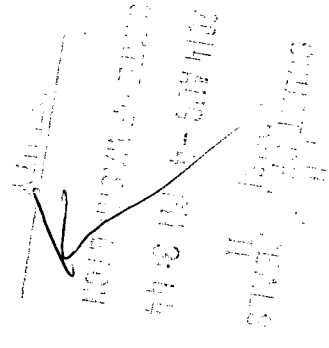
Washington Utilities & Transportation Commission and Waste Management of Washington, Inc.,

Respondents.

APPELLANT'S OPENING BRIEF

Jared Van Kirk, WSBA #37029
Stephen B. Johnson, WSBA #6196
GARVEY SCHUBERT BARER
Attorneys for Appellants
Stericycle of Washington, Inc.

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
206 464 3939



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I. INTRODUCTION

For nearly 20 years, Stericycle of Washington, Inc. ("Stericycle") has provided safe, reliable, innovative, and environmentally responsible collection and transportation of infectious biomedical waste generated by hospitals, clinics, and other healthcare providers at stable rates pursuant to a Certificate of Public Convenience and Necessity ("Certificate") issued by the Washington Utilities and Transportation Commission (the "Commission").

Biomedical waste collection is governed by chapter 81.77 RCW, the statute enacted by the Washington Legislature in 1961 to govern solid waste collection. The purpose of the Legislature was to promote and protect reliable services, and it decided that limiting competition in favor of direct regulation of rates, charges, and other terms of service would best serve this purpose. RCW 81.77.040, therefore, bars the Commission from issuing new certificate authority in territory served by existing solid waste collection companies unless "the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission." Consistent with the Legislature's intent, the courts and Commission have consistently interpreted the "satisfactory service" requirement to preclude a grant of competing authority in the absence of a deficiency in the quality of existing carriers' services or in their ability to meet customers' service needs.

In the Final Order on review, however, the Commission radically reinterpreted the "satisfactory service" requirement contrary to RCW 81.77.040, the Legislature's intent, and its own well established precedent. The Commission granted authority to Waste Management of Washington, Inc. ("Waste Management") in territory already served by Stericycle without finding any deficiency in Stericycle's services. For the first time, the Commission's Final Order asserts the prerogative to grant overlapping certificate authority based solely on the alleged benefits of competition, reading the "satisfactory service" requirement out of RCW 81.77.040.

The Commission's Final Order is unsupported by evidence in the record and relies on nothing more than bald assumptions and assertions to support this departure from the Commission's consistent prior interpretation of the statutory "satisfactory service" requirement and is therefore arbitrary and capricious.

II. ASSIGNMENTS OF ERROR

1. The Commission erroneously interpreted RCW 81.77.040 and exceeded its statutory authority in granting Waste Management's application.

Issue: May the Commission interpret RCW 81.77.040 contrary to its plain meaning, legislative intent, and the Commission's own established precedent to give itself the authority to issue overlapping certificate authority because it believes more competition would be "appropriate" and "consistent with the public interest"?

2. The Commission erred by reversing its well-established precedent without evidentiary support or a reasoned explanation.

Issue: May the Commission reverse decades of established precedent holding that overlapping biomedical waste collection service may not be authorized based on a mere preference for competition, but must instead be based on a factual showing that the specialized needs of biomedical waste generators are not being met, without honestly acknowledging the change, and without reasoned analysis based on substantial evidence in the record?

3. The Commission erred by holding that Stericycle's biomedical waste services are not satisfactory (and by adopting the Initial Order's finding of fact No. 3).

Issue: May the Commission find that Stericycle's existing biomedical waste services are not satisfactory under RCW 81.77.040 based on an assumption of generator "need" for competition that is unsupported by substantial evidence and is arbitrary and capricious?

III. STATEMENT OF THE CASE

A. The Parties.

In 1992 Stericycle's parent company opened a biomedical waste treatment facility in Morton, Washington.[1] In 1995 Stericycle obtained permanent statewide authority to collect and transport biomedical waste to

[1] MP-1T, ¶6 (AR: 3359). The Clerk of the Superior Court has transferred the Administrative Record to this Court. Administrative Record citations will identify the original document and page or paragraph number and then cite the Administrative Record ("AR") by page number in a parenthetical.

the Morton facility under Certificate G-244.[2] No company has competed with Stericycle on a statewide basis since 1999.[3] Nonetheless, Stericycle provides a robust array of services and has consistently innovated to meet customers' service needs.[4] In 14 years without statewide competition, Stericycle has never raised its rates, effectively *lowering* the real cost of its services by holding rates steady when prices generally have risen by 68%.[5] The record demonstrates Stericycle's exemplary service: in 20 years only six complaints have been made to the Commission, only two of which have been upheld on review by the Commission Staff.[6]

Waste Management is the holder of Certificate G-237, which authorizes it to provide solid waste collection services including biomedical waste collection in limited territories within several Washington counties.[7] On December 30, 2011 Waste Management applied to the Commission for authority to provide biomedical waste collection services in the areas of Washington that it was not already authorized to

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[2] *Id.*, ¶¶4, 6 (AR: 3358-59); *see also In re Ryder Distrib. Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G. No. 1761, p.12, App. Nos. GA-75154 and GA-77359 (Aug. 11, 1995) (granting Stericycle permanent authority).
[3] MP-15T, ¶¶2, 4, 7 (AR: 3432-34).
[4] Stericycle's services are explained in detail in unrebutted testimony by Stericycle's Regional Operations Director. *See* MP-1T, ¶¶14-48 (AR: 3361-70). Stericycle's innovations include non-incinerative treatment and disposal of waste, reusable leak and puncture proof biomedical waste containers, cradle-to-grave waste tracking, a large catalogue of collection containers, reusable sharps containers, an in-facility sharps management program, and regulatory compliance programs for customers. *See id.*, ¶4 (AR: 3358); MP-15T, ¶¶7-11, 27 (AR: 3434-35, 42).
[5] MP-1T, ¶13 (AR: 3360); MP-15T, ¶15 (AR: 3437); MP-19 (AR: 3492) (Stericycle's tariff history).
[6] MP-15T, ¶22 (AR: 3440); MP-20 (AR: 3540) (Stericycle's complaint record).
[7] Certificate G-237 (AR: 11-31); Map of Waste Management service area (AR: 233).

serve.[8] The territory covered by Waste Management's application includes most of Washington's rural areas that Waste Management did not previously serve.[9] This application is the subject of the present litigation.

B. RCW 81.77.040.

The Commission's authority to issue certificates authorizing the collection of solid waste (including biomedical waste) derives entirely from RCW 81.77.040, part of the solid waste statute enacted by the Legislature in 1961. To issue certificate authority to collect and transport any type of solid waste, the Commission must meet two statutory requirements. First, for all applications to provide solid waste collection service the Commission must find that the "public convenience and necessity require" the proposed service after considering at least five non-exclusive factors, including the "sentiment in the community contemplated to be served as to the necessity for such a service."[10]

Second, "[w]hen an applicant requests a certificate to operate in territory already served by a certificate holder," RCW 81.77.040 provides that in addition to the "public convenience and necessity" ("PCN") requirement the Commission may issue new certificate authority "only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission . . .

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[8] Waste Management application (AR: 6-91).
[9] Map of Waste Management service area (AR: 233) (Available as Appendix B).
[10] RCW 81.77.040. The full text of RCW 81.77.040 is Available as Appendix A.

."[11] This determination may only be made after existing service providers are given "notice and an opportunity for a hearing" on the "satisfactory service" issue.[12] Thus, for applications to provide competing solid waste collection service, RCW 81.77.040's "satisfactory service" requirement limits the Commission's authority under the PCN standard by requiring an additional factual finding, after an evidentiary hearing, that the services provided by existing companies are not satisfactory.[13]

When chapter 81.77 RCW was enacted by the Legislature in 1961 these restrictions on entry into the business of solid waste collection replaced those of the 1935 motor carrier act, which did not contain a "satisfactory service" requirement.[14] RCW 81.77.040's entry restrictions were modeled on the earlier 1921 auto transportation statute, which did contain a "satisfactory service" requirement.[15] The Commission recently explained that "the legislature has made a judgment that the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizable

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[11] *Id.* (emphasis added).
[12] *Id.*
[13] Indeed, unchallenged Commission precedent holds that the "satisfactory service" requirement is the "threshold test" because it can be dispositive of an application to provide overlapping service. *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639, p.3, App. No. GA-896 (June 30, 1993).
[14] *See City Sanitary Serv., Inc. v. Utils. and Transp. Comm'n*, 64 Wn.2d 739, 742, 393 P.2d 952 (1964) (explaining that the formerly named "garbage and refuse" carriers were regulated under RCW 81.80 [the codification of the 1935 act] until 1961, when they were moved under the provisions of RCW 81.77); *see also* Laws of 1935, ch. 184, § 5; Laws of 1961, ch. 295.
[15] *Compare* RCW 81.77.040 (1961); Laws of 1961, ch. 295, § 5 *with* RCW 81.68.040 (1961).

investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider."[16] "The legislature has determined that a monopoly-based system for solid waste collection is consistent with the public interest."[17]

Under RCW 81.77.040, Commission precedent has long required applicants seeking to provide competing solid waste collection services to make a factual showing that the services provided by existing solid waste collection companies are in some way deficient.[18] For more than 20 years

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[16] Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894* (hereinafter "2010 Report to the Legislature"), pp. 11-12 (Jan. 14, 2010) (discussing legislative intent in regulating commercial ferries, solid waste collection, and auto transportation). *Available at* http://www.utc.wa.gov/regulatedIndustries/transportation/commercialFerries/Pages/default.aspx.

[17] *In re Med. Res. Recycling Sys.*, Order M.V.G. No. 1633, p.2, App. No. GA-76819 (May 28, 1993); *see also In re Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order, p. 10, n.1 (Aug. 14, 1998) (recognizing that chapter 81.77 RCW "expresses a preference for monopoly service in the collection of solid waste . . . ."); *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1663, p.8, App. No. GA-75968 (Nov. 19, 1993) (finding that 81.77 RCW "follows the pattern of utility regulation, in that it treats solid waste collection as a natural monopoly with efficiencies and public benefit gained through exclusive service in a territory."); *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402, pp. 15-16, App. Nos. GA-845 and GA-851 (July 28, 1989) (finding that "the Legislature in enacting RCW 81.77 was reluctant to permit overlapping authorities in the collection and disposal of garbage and refuse.")

[18] The Commission has consistently considered serious and pervasive failures in delivering solid waste services and consistent failures to provide adequate customer service. *See, e.g., In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1526, p.15, App. No. GA-849 (Nov. 20, 1991) (finding service complaints not "pervasive" and that the evidence did not "demonstrate that large numbers of customers, or a substantial proportion of the customers, are experiencing consistently serious problems with the quality of physical service provided by the existing carrier."); *Id.* at p.11 (*citing In re DiTomasso*, Order M.V.G. No. 786, App. No. GA-508 (Sept. 1975), *adopted by* Order M.V.G. No. 795 (Nov. 1975) (finding unsatisfactory service based on complaints about unreliable service, frequently missed pickups, poor equipment, inadequate response to complaints, problems establishing service, and difficulty correcting billing errors)); *R.S.T. Disposal*, Order M.V.G. No. 1402, p. 37 (citing repeated service failures, repeated and knowing failures to establish service, and failure to correct violations despite assurances

the Commission has consistently held that existing biomedical waste service is unsatisfactory only if it does not meet generators' specialized biomedical waste service needs.[19] A preference for greater competition or for a duplicative or merely equivalent service cannot satisfy the "satisfactory service" requirement.[20]

C. Commission Proceedings.

Pursuant to RCW 81.77.040, Stericycle protested Waste Management's application for biomedical waste collection authority in new territory on the ground that Stericycle was providing fully satisfactory biomedical waste services throughout the territory covered by the

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to the Commission); *In re Lawson Disposal, Inc.*, Order M.V.G. No. 1264, p. 5, App. No. GA-824 (Jan. 20, 1987) (finding unsatisfactory service where a substantial portion of the customers made consistent complaints over time about the lack of cleanliness around drop boxes and about late pickups).

[19] *See, e.g., Ryder Distrib. Res.*, Order M.V.G. No. 1761, p.12 ("Because existing carriers do not offer a collection, transportation and disposal service which meets [the medical community's] needs, the existing carriers will not provide service to the satisfaction of the Commission."); *Med. Res. Recycling Sys.*, Order M.V.G. No. 1633, p.2 (finding that the "satisfactory service" requirement is applied to biomedical waste collection based on "the unique requirements and attributes of that service."); *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596, p.11, App. Nos. GA-75154 (Jan. 25, 1993) ("The satisfactory nature of service by providers of specialized solid waste collection services is measured according to the specialized needs of customers. It may include the technology of disposal, the nature of protection afforded collected waste, and protections against statutory and civil liability."); *In re Am. Envtl. Mgmt. Corp.*, Order M.V.G. No. 1452, p.9, App. No. GA-874 (Nov. 30, 1990) (finding that specialized needs for biomedical waste collection were not met by existing providers); *In re Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451, p.15, App. No. GA-868 (Nov. 30, 1990) (addressing "whether the type of service provided reasonably serves the [biomedical waste] market.").

[20] *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674, p.4-5, App. No. GA-75968 (Dec. 20, 1993) (emphasis added) (Stating the Commission's "consistent view that . . . mere preference for competition does not demonstrate a need for an additional carrier."); *Ryder Distrib. Res.*, Order M.V.G. No. 1596, p.11 ("The existing carriers do not provide an equivalent service."); *Am. Envtl. Mgmt. Corp.*, Order M.V.G. No. 1452, p.9 (holding that existing service "is not being duplicated by this grant of [authority for] a new, specialized infectious waste service.").

application. The Administrative Law Judge ("ALJ") who presided at the ensuing hearing recognized the centrality of the "satisfactory service" requirement and required the parties to "brief the legal issue of the interpretation of the ["satisfactory service"] provision in RCW 81.77.040 . . . ."[21] In response, Waste Management contended that "service without meaningful competition is not, irrespective of incumbent service quality, service to the satisfaction of the commission."[22] Stericycle cited the Commission's precedent that "mere preference for competition does not demonstrate a need for an additional carrier."[23] The Commission Staff opposed Waste Management's contention because the Commission's "discretion is limited by the plain language of RCW 81.77.040."[24] The Commission Staff noted that the Commission "has consistently required a *factual* showing that the incumbent provider is not meeting the specialized needs of customers."[25]

The ALJ held in prehearing Order 05 that "[t]he satisfactory nature of service by providers of specialized solid waste collection services is measured according to the specialized needs of customers."[26] Order 05

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[21] Prehearing Conference Order 01, ¶6 (AR: 136).
[22] Waste Management's Opening Brief on Preliminary Legal Issue, ¶24 (emphasis added) (AR: 514).
[23] Protestant Stericycle of Washington, Inc.'s Memorandum Concerning . . . Service to the Satisfaction of the Commission, ¶¶4, 11 (*citing Sureway Med. Serv.*, Order M.V.G. No. 1674, pp. 4-5) (AR: 486, 91).
[24] Commission Staff's Response Brief on Preliminary Legal Issue, ¶2 (AR: 806).
[25] *Id.*, ¶3 (emphasis in original) (AR: 807).
[26] Order 05, ¶8 (*quoting Ryder Distrib. Res.*, Order M.V.G. No. 1596, p.11 (emphasis in original)) (AR: 1205).

rejected Waste Management's position and, consistent with the Commission's precedent and Stericycle and the Commission Staff's position, ruled that "[n]one of the Commission's decisions . . . can reasonably be interpreted to hold that a desire for competitive alternatives, without more, is sufficient to find that incumbent providers will not provide service to the satisfaction of the Commission."[27] The evidentiary hearing was expressly limited to the issues set out in Order 05, including the "satisfactory service" issue as explained in the order.[28]

Ten biomedical waste generators and representatives of hospital and dental trade associations testified at the hearing. None identified any need for biomedical waste services that Stericycle did not already provide. Six of the generators testified that they had no complaint about Stericycle's services.[29] Seven generator witnesses stated a general

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[27] *Id.*, ¶10 (AR: 1206).
[28] *Id.*, ¶12 (AR: 1206).
[29] Ray Moore, PeaceHealth System, stated that Stericycle had been a "good partner" and that he had "no complaints" about Stericycle's services. Hearing Transcript (hereinafter "Transcript"), 394:2-11 (the transcript begins at AR: 4213, but the transcript pages do not have individual AR numbers). Danny Warner, Warner Dentistry and Washington State Dental Association, had "no problem" with Stericycle's services "at all." *Id.*, 412:12-413:5. Terry Johnson, Lake Chelan Community Hospital, was "not testifying that any aspect of Stericycle's current services are not satisfactory." *Id.*, 237:16-19. Emily Newcomer, UW - Seattle Campus, had "no complaints" with Stericycle's services and continues to use them notwithstanding the availability of Waste Management's services. *Id.*, 543:15-24, 545:24-546:11. Jeff Mero, Association of Washington Public Hospital Districts, testified that Stericycle is "a reliable and cost-effective provider of biomedical waste management and collection services" JM-1T, ¶3 (AR: 4171). Taya Briley, Washington Hospital Services, testified that "WHS continues to endorse Stericycle as a reliable and cost-effective provider." TB-1T, ¶3 (AR: 4166).

preference for competition in the application territory.[30] Most of these generators expressed only a generic desire for competition, not for Waste Management's services.[31]

D. Commission Decisions.

The ALJ's Initial Order did not find that Stericycle's services were deficient or failed to meet customers' needs for biomedical waste services. The Initial Order again recognized "the Commission's prior decisions that a desire for competition is insufficient to satisfy RCW 81.77.040."[32] However, the Initial Order then purported to "revisit" that precedent, concluding that the Commission's prior decisions did "not reflect the realities of the current marketplace" and, therefore, that "the Commission will not rely on those prior decisions to make the requisite determination

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[30] *See* TJ-1T, p.3 (AR: 2310); JL-1T, p.3 (AR: 2313); RL-1T, pp.3-4 (AR: 2323-24); RM-1T, p.4 (AR: 2317); CP-1T, pp.3-4 (AR: 2327-28); JS-1T, p.3 (AR: 2307); DW-1T, pp.2-3 (AR: 2319-20).

[31] Transcript, 443:14-23 (Rodger Lycan, Pathology Associates Medical Laboratories, wants competition "in the general sense" from any company that could handle biomedical waste); 215:6-12 (Julie Sell, Olympic Medical Center, confirmed that the "alternative doesn't have to be Waste Management"); 238:12-17, 244:23-25 (Mr. Johnson "[does] not have a preference" about which company provides competition); 323:21-25 (Jean Longhenry, Wendel Family Dental Centre, admitted that "[a]ny company that could collect" could be an alternative); 393:19-394:1 (Mr. Moore confirmed that competition could be from any provider that can provide services); 481:4-13 (Carla Patshkowski, Providence Medical Group, admitted that competition could "be from anyone").

[32] Initial Order 07, ¶10 (*quoting Sureway Med. Serv.*, Order M.V.G. No. 1674) (footnote 8 of Order 07 cites a different proceeding, but based on the quotation and context this is an erroneous citation) (AR: 2072-73). The ALJ did not, however, recognize the consistent Commission precedent holding that existing biomedical waste collection service is unsatisfactory only if it does not meet generators' specialized biomedical waste service needs. *See supra*, note 19.

in this case."[33] The ALJ was silent about reversing his prehearing Order 05. The ALJ reached this conclusion without notice and without giving the parties an opportunity to present evidence or otherwise address this departure from established precedent. The ALJ made no findings of fact related to this conclusion. The Initial Order granted Waste Management's application, holding that Stericycle "will not provide service to the satisfaction of the Commission without the statewide competitive alternative [Waste Management] would provide."[34]

On Stericycle's timely petition for review, the Commission affirmed and adopted the Initial Order.[35] The Final Order made no finding that Stericycle's services did not fully satisfy the service needs of biomedical waste generators in the application territory. The Commission did, however, reinterpret RCW 81.77.040 without citing any finding of fact or record evidence.[36] The Commission now claimed that its power to grant overlapping authority under RCW 81.77.040's "satisfactory service" requirement "is not limited to circumstances of inadequate service," instead holding that the statute gives it "discretion to determine the appropriate number of solid waste collection service providers who should

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[33] *Id.*, ¶¶10, 15 (AR: 2072-74). That an ALJ would disregard 20 years of Commission precedent and his own prehearing Order 05 is anomalous to say the least and suggests outcome-based decision making.
[34] *Id.*, ¶16 (AR: 2075).
[35] Final Order 10, ¶5 (AR: 2259).
[36] *Id.*, ¶¶7-8, 10-15 (AR: 2261-64).

be authorized to operate within a particular service territory consistent with the public interest."[37]

As a result of its new interpretation of its authority under RCW 81.77.040, the Commission reversed its prior holdings that existing biomedical waste collection services are unsatisfactory only if they do not meet generators' specialized biomedical waste service needs and that preference for competition does not establish such a need. Instead, the Final Order holds that an applicant for overlapping authority can show that an existing biomedical waste collection company "will not provide service to the satisfaction of the Commission by proving that (1) generators of biomedical waste have an unmet need for an effective competitive alternative to the incumbent service providers, and (2) the new entrant will enhance the effectiveness of competition in the marketplace."[38]

Stericycle petitioned for review of this erroneous decision in Thurston County Superior Court. In an oral ruling Judge Eric Price denied Stericycle's petition. Stericycle now appeals to this Court to reverse the Commission's erroneous Final Order.[39]

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[37] *Id.*, ¶¶8, 13 (AR: 2260-61, 64).
[38] *Id.*, ¶14 (AR: 2264). The Commission's verbal sleight of hand thus converts the general generator preference for competition it had previously discussed (and rejected) into a "need" for an additional service provider.
[39] An appellate court reviewing agency action "sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

IV. ARGUMENT

A. The Commission Erroneously Interpreted RCW 81.77.040 and Exceeded its Statutory Authority.

1. The Court must review the Commission's erroneous statutory interpretation de novo and enforce the plain meaning and legislative intent of RCW 81.77.040.

A reviewing court must reverse an agency order if "[t]he agency has erroneously interpreted or applied the law" or if "[t]he order is outside the statutory authority . . . of the agency . . . ."[40] These questions of law are reviewed de novo.[41] It is the duty and prerogative of the courts to interpret the purpose and meaning of statutes.[42]

When interpreting a statute, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."[43] To determine legislative intent, courts must consider a number of factors. Of course, the language

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[40] RCW 34.05.570(3)(b), (d); *Waste Mgmt. of Seattle, Inc. v. Utils. and Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994).

[41] *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005) ("We review issues of law under RCW 34.05.570(3)(d) de novo"); *Waste Mgmt.*, 123 Wn.2d at 627 ("Construction of a statute is a question of law which we review de novo under the error of law standard.").

[42] *Senate Republican Campaign Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 240-41, 943 P.2d 1358 (1997) ("it is the ultimate prerogative of the courts to settle the purpose and meaning of statutes."); *see also Waste Mgmt.*, 123 Wn.2d at 627-28 ("The courts retain the ultimate authority to interpret a statute.").

[43] *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4, 9-10 (2002); *see also Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 6, 721 P.2d 1, 4 (1986) ("In construing statutes, the goal is to carry out the intent of the Legislature."); *Sacred Heart Med. Ctr. v. Dept. of Revenue*, 88 Wn.App. 632, 636, 946 P.2d 409 (1997) (Div. 2) (same).

of the statutory provision must be evaluated.[44] However, a "plain meaning" analysis is broader than an assessment of words alone. In *Department of Ecology v. Campbell & Gwinn* the Supreme Court held that plain meaning must be "derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."[45] The Supreme Court has recently reiterated that "we do not interpret statutes in isolation. We interpret statutes *in pari materia*, considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create a unified whole."[46]

Thus, a court must evaluate the language of the provision together with all legislative context, including:

- The rules of grammar and dictionary definitions;[47]
- Definitional clauses and statements of legislative purpose;[48]

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[44] *See, e.g., Campbell & Gwinn*, 146 Wn.2d at 11 (considering the statutory language).
[45] *Id.* at 11-12 (noting that "the theory of language and meaning in which 'words have inherent or fixed meanings' is 'now discredited'" and concluding that "this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent." (citation omitted)).
[46] *Diaz v. State*, 175 Wn.2d 457, 466, 285 P.3d 873 (2012).
[47] *See, e.g., Campbell & Gwinn*, 146 Wn.2d at 11 (identifying the "basic rules of grammar" (citation omitted)); *Senate Republican Campaign Comm.*, 133 Wn.2d at 243 (citing dictionary definitions of statutory terms).
[48] *See, e.g., Campbell & Gwinn*, 146 Wn.2d at 11 (identifying "special usages stated by the legislature on the face of the statute" and "legislative purposes or policies appearing on the face of the statute." (citation omitted)); *Peacock v. Pub. Disclosure Com'n*, 84 Wn.App. 282, 289-90, 928 P.2d 427 (1996) (Div. 2) (interpreting statute in light of statutory statement of purpose).

- Other provisions within the same statute, interpreting the statute as a whole in a manner that gives independent meaning to each provision;[49]
- Related statutes, giving separate effect to the different statutes that comprise the Legislature's complete regulatory scheme;[50]
- The historical sequence of enactments and amendments to the statute at issue and related statutes;[51] and
- The ordinary use of words and phrases at the time of enactment and contemporaneous understanding of terms of art.[52]

A statutory provision is not ambiguous unless it remains "susceptible to more than one reasonable meaning," after completing the plain meaning analysis required by the Supreme Court.[53] Only if ambiguity remains after that analysis may a court consider an agency's

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[49] *See, e.g., Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 627, 278 P.3d 173 (2012) ("The plain meaning is discerned from all that the Legislature has said in the statute."); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 220, 11 P.3d 762 (2000) ("All language in a piece of legislation should be given effect, so that no provision is rendered superfluous."); *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780-81, 903 P.2d 443 (1995) ("we must look to the whole statute, rather than the single phrase at issue."); *Sacred Heart Med. Ctr.*, 88 Wn.App. at 636, 639 ("When determining intent, this court must interpret the language at issue in the context of the entire statute" and "a statute must be interpreted so as to give all of its language meaning.").

[50] *See, e.g., Broughton Lumber*, 174 Wn.2d at 627 ("Plain meaning may also be discerned from related statutes which disclose legislative intent about the provision in question."); *Waste Mgmt.*, 123 Wn.2d at 630 ("Statutes relating to the same subject are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." (citation omitted)); *Bour v. Johnson,* 122 Wn.2d 829, 835, 864 P.2d 380, 383 (1993) ("statutes must be read together to give each effect.").

[51] *See, e.g., Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157 (2012) (examining "related statutes aids our plain meaning analysis because legislators enact legislation in light of existing statutes." (citation omitted)); *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) ("Courts . . . consider the sequence of all statutes relating to the same subject matter."); *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (same).

[52] *See, e.g., Jongeward*, 174 Wn.2d at 595-96; (analyzing the historical understanding of a term of art); *Bloomer v. Todd*, 3 Wash. Terr. 599, 615, 19 P. 135 (1888) ("The ordinary use of words at the time when used, and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent.").

[53] *Campbell & Gwinn*, 146 Wn.2d at 12.

interpretation.[54] "The fact that two or more interpretations are conceivable does not render a statute ambiguous."[55] "Strained, unlikely or unrealistic interpretations are to be avoided."[56] Courts must reject administrative interpretations that conflict with a statute.[57] "[I]t is the duty of the court in interpreting a statute to make the statute purposeful and effective."[58]

2. RCW 81.77.040 prohibits the grant of competing solid waste authority unless the characteristics of existing solid waste services are proved deficient.

The Commission has no authority to allow competing service simply because it believes greater competition would serve the public interest. The "satisfactory service" requirement bars the Commission from authorizing competing service unless it finds that existing services are deficient in their quality or adequacy to meet customers' service needs.

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[54] *Id.*; *Waste Mgmt.*, 123 Wn.2d at 627-28 ("Absent ambiguity . . . there is no need for the agency's expertise."). Even if there is a legitimate ambiguity, little deference is given to an agency's recent statutory interpretation that conflicts with an earlier interpretation. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447, n.30, 107 S.Ct. 1207 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (citation omitted); *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 605 (9th Cir. 2008); *Senate Republican Campaign Comm.*, 133 Wn.2d at 240-41 (declining to give deference to an agency interpretation that was inconsistent with its prior statements to a regulated entity).

[55] *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

[56] *Bour*, 122 Wn.2d at 835; *Safeway, Inc. v. Dep't of Revenue*, 96 Wn.App. 156, 160, 978 P.2d 559 (1999) (Div. 2) (same); *see also Seven Gables*, 106 Wn.2d at 6 ("Any statutory interpretation which would render an unreasonable and illogical consequence should be avoided.").

[57] *See, e.g.*, *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141, 160-61, 157 P.3d 831 (2007) ("We will not defer to [an agency's] declaratory order that conflicts with a statute."); *Senate Republican Campaign Comm.*, 133 Wn.2d at 241 (An "administrative determination will not be accorded deference if the agency's interpretation conflicts with the relevant statute."); *Safeway*, 96 Wn.App. at 160 (same).

[58] *Seven Gables*, 106 Wn.2d at 6.

i. *RCW 81.77.040's "satisfactory service" requirement must be given meaning, barring the Commission from authorizing competing service simply because it believes additional competition is in the public interest.*

Under the canon that each provision of a statute must be given independent meaning, the "satisfactory service" requirement bars the Commission from authorizing competing solid waste service simply because it would be beneficial and in the public interest. The Commission asks the Court to approve an interpretation of RCW 81.77.040 that is inconsistent with legislative intent and improperly reads the "satisfactory service" requirement out of the statute.

RCW 81.77.040's PCN standard requires that the Commission find that the public convenience and necessity would be served by the proposed services, considering any relevant factors including the "sentiment in the community contemplated to be served as to the necessity for such a service." Thus, the Commission must consider all factors bearing on the harm or benefit of a proposed service, including generators' views about whether a competing service is needed, and decide, on balance, if a grant of authority is in the public interest.

The "satisfactory service" requirement is a separate limitation on the Commission's discretion when an applicant seeks overlapping authority to provide competing service, and must be given independent meaning. In these applications, "after notice and an opportunity for a

hearing" the Commission may use its discretion to issue certificate authority "only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission . . . ."[59] Thus, the structure of RCW 81.77.040 demonstrates the Legislature's intent to limit the Commission's authority under the broad, discretionary PCN standard by requiring a separate factual finding, after an evidentiary hearing, that the services provided by existing companies are not satisfactory.[60]

The "satisfactory service" requirement is not, as the Commission contends, merely a grant of discretionary authority to authorize competing solid waste collection services whenever the Commission believes more providers are "appropriate" or "consistent with the public interest."[61] These are already findings that the Commission must make under the PCN standard. Even if the Commission determines that such competition would be beneficial (or, as the Commission phrases it, "effective"),[62] it is still just finding that more service providers would be in the public interest. Generator preference for more service providers and the benefits of

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[59] RCW 81.77.040 (emphasis added).
[60] Indeed, the Commission holds that the "satisfactory service" requirement is the "threshold test" because it can be dispositive of an application to provide overlapping service. *Superior Refuse Removal*, Order M.V.G. No. 1639, p.3.
[61] *See* Final Order 10, ¶8 (AR: 2261) (claiming "discretion to determine the appropriate number of solid waste collection service providers . . . consistent with the public interest.").
[62] *See* Final Order 10, ¶14 (AR: 2264) (claiming discretion to find existing service unsatisfactory based on "an unmet need for an effective competitive alternative" and that "the new entrant will enhance the effectiveness of competition").

competition are, at most, elements of the PCN determination (in which the Commission must specifically consider consumers' views about the necessity for the proposed service). The "satisfactory service" requirement is a separate, independent requirement that limits the Commission's PCN authority and, thus, cannot be satisfied by findings that more competing service providers are "appropriate," "consistent with the public interest," or "effective."[63] The Commission's interpretation of RCW 81.77.040 would read the "satisfactory service" requirement out of the statute and, hence, must be rejected.

ii. *The language and purpose of RCW 81.77.040 requires an evaluation of the quality and sufficiency of services provided by existing carriers.*

RCW 81.77.040's "satisfactory service" requirement employs the term "service" in a specific way. It requires a finding after an evidentiary hearing that the "existing solid waste collection company or companies serving the territory" will not provide satisfactory service. The provision's focus on *existing* companies that are *serving* the territory, and the requirement for a hearing, demonstrates the Legislature's intent to require a factual inquiry into the attributes of the services that are actually being

[63] *See, e.g., Amalgamated Transit Union*, 142 Wn.2d at 220 ("All language in a piece of legislation should be given effect, so that no provision is rendered superfluous."); *Sacred Heart Med. Ctr.*, 88 Wn.App. at 639 ("When determining intent, this court must interpret the language at issue in the context of the entire statute" and "a statute must be interpreted so as to give all of its language meaning.").

provided and a factual finding from record evidence that they are deficient or otherwise fail to meet customers' service requirements.

The Commission's new interpretation of the "satisfactory service" requirement is not consistent with this language, as it would allow the Commission to disregard the quality and sufficiency of existing services and grant overlapping authority based on generator preference for more competition. If the Legislature had intended to give the Commission this authority, it would have omitted the "satisfactory service" requirement, leaving the Commission free to determine whether another provider would advance the public interest under the PCN standard. The "satisfactory service" protection for existing providers cannot be read out of the statute.

This plain language interpretation is supported by the ordinary meaning of "service." Applicable dictionary definitions state that "service" is "the performance of work commanded or paid for by another."[64] Relevant to solid waste collection, such work includes "the provision, organization, or apparatus for conducting a public utility or meeting a general demand."[65] Thus, when the Legislature instructed the Commission to decide if existing "service" is satisfactory, it was instructing the Commission to evaluate the characteristics of the labor, equipment and other "organization" and "apparatus" used by existing

[64] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). *See Senate Republican Campaign Comm.*, 133 Wn.2d at 244 (citing Webster's Third New International Dictionary); *Sacred Heart Med. Ctr.*, 88 Wn.App. at 636 (same).
[65] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

companies to meet the "general demand." The definition of "service" does not allow the Commission's interpretation, which entirely disregards the quality and sufficiency of the attributes of existing services.

This interpretation is supported by *Superior Refuse Removal v. Utilities and Transportation Commission,* the only case to directly address the meaning of the "satisfactory service" requirement in the solid waste statute. Initially, "the Commission interpreted 'service to [its] satisfaction' as used in RCW 81.77.040 to mean 'the garbage must be collected on time and regularly.'"[66] In a prior appeal, the Court of Appeals held that "the standard applied by the Commission, i.e. regular and on schedule service was 'overly simplistic.'"[67] The Court reiterated that the Commission must also consider the nature of service complaints and the existing provider's response to those complaints.[68] The Court then carefully evaluated detailed evidence concerning the attributes of the existing service.[69]

In *Superior Refuse Removal*, the *subject* of the "satisfactory service" requirement was understood to be the characteristics of the service provided by the incumbent service provider. The Commission originally considered whether that service was being provided regularly and on time. The Court decided that it must also consider complaints and

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[66] *Superior Refuse Removal, Inc. v. Utils. and Transp. Comm'n*, 81 Wn.App 43, 46, 913 P.2d 818 (1996).
[67] *Id.* at 47 (*citing Superior Refuse Removal Corp. v. Utils. and Transp. Comm'n*, 60 Wn.App 1081 (1991) (unpublished)).
[68] *Id.*
[69] *Id.* at 48-51.

the existing provider's response. The Commission and Court agreed, however, that the attributes of the existing provider's service was at issue, not the number of providers or the possible benefits of competition.

Likewise, in *Pacific Northwest Transportation Services v. Utilities and Transportation Commission*, a case addressing the auto transportation statute's functionally identical satisfactory service test, the court held that the Commission must assess the incumbent carrier's "conduct" and future "performance," based on "the service the incumbent was rendering."[70] The court allowed the Commission to draw an inference about an incumbent carrier's future service from its past performance and unsurprisingly indicated that the Commission has discretion to decide how to evaluate existing service.[71] *But* the court was clear that the subject of the Commission's evaluation must be the characteristics of existing service.

The reasoning in *Superior Refuse Removal* and *Pacific Northwest Transportation* would be entirely superfluous if the Commission's statutory interpretation were correct. Instead of addressing attributes of an existing carrier's service and drawing an inference about the quality and sufficiency of future service, the Commission could simply decide that another carrier was "appropriate," "consistent with the public interest," or

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[70] *Pac. Nw. Transp. Servs., Inc. v. Utils. and Transp. Comm'n*, 91 Wn.App 589, 597, 959 P.2d 160 (1998) (emphasis added).

[71] *Id.* at 596-97 ("[t]he statute does not specify how the Commission is to make [the satisfactory service] determination. Indeed, on its face it would seem to give the Commission discretion to assess an incumbent carrier's future conduct in any logical and reasonable way supported by the evidence.").

beneficial.[72] As the Commission has repeatedly acknowledged, the Legislature intended to promote quality solid waste service by restricting competition unless existing services were deficient.

The stated purpose of RCW 81.77.040's entry restrictions and regulation of rates and services is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state."[73] The Commission has recognized repeatedly that the Legislature intended to restrict competition and follow a "monopoly service" model in the public interest.[74] The Legislature's purpose is not to ensure a competitive marketplace for solid waste services but, rather, to promote reasonably priced services throughout the state by *limiting* the number of providers and regulating their rates and services. The Commission's reinterpretation of the "satisfactory service" requirement thus conflicts with the language and purpose of RCW 81.77.040.

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[72] In addition, both courts relied on the rule that the satisfactory service decision must be based on "the service the incumbent was rendering *before* the filing of an application" because "[t]he public is benefited by an incumbent carrier being motivated to improve its service" by the threat of possible future competition. *Pac. Nw. Transp. Servs.*, 91 Wn.App at 597; *Superior Refuse Removal*, 81 Wn.App at 51. This rule is based on long-standing Commission precedent. *See, e.g., Am. Envtl. Mgmt.*, Order M.V.G. No. 1452, p. 5 (*citing In re Application of Anthony J. DiTommaso*, Order M.V.G. No. 795, p. 7, Hearing No. GA-508 (1975)). This rule would be superfluous under the Commission's interpretation because an existing carrier's services could be found unsatisfactory as a result of factors entirely beyond its control; *i.e.*, the Commission could find, as it did in this case, that otherwise satisfactory service was unsatisfactory simply because the Commission believes that competition would be beneficial.

[73] RCW 81.77.100; *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 399 (9th Cir. 1995) (noting that the Commission also "concluded that there is a particular need to ensure service to rural areas at reasonable rates in order to reduce the incentive for illicit dumping in these areas.").

[74] *See supra* note 17.

3. The history of motor vehicle transportation regulation demonstrates the Legislature's deliberate choice to preclude competition unless existing services are deficient.

The meaning of RCW 81.77.040 is also clear in light of the statutory scheme of which it is a part and the historical development of that scheme. The Legislature has regulated motor vehicle transportation since at least 1921. The 1921 act governing auto transportation companies restricted the entry of new companies while regulating rates and services. In 1961 the Legislature imported the "satisfactory service" requirement from the 1921 auto transportation act into RCW 81.77.040, rejecting the looser entry regulations in the 1935 motor carrier act that had governed solid waste collection prior to 1961. The Legislature's choice shows that it intended to bar the Commission from authorizing competition in solid waste collection unless the services provided by existing carriers fail to meet customers' service needs or are otherwise deficient.

i. *The 1921 auto transportation act barred competing carriers unless existing services were deficient or inadequate to meet service needs.*

In 1921 the Legislature passed an act regulating the transportation of people and property by "auto transportation" companies.[75] Like the solid waste statute, the 1921 act was intended to establish regular and dependable service by encouraging investment and protecting existing

[75] Laws of 1921, ch. 111, § 1(d).

service providers from competition.[76] Entry into the "auto transportation" business required "a certificate declaring that public convenience and necessity require such operation."[77] In a separate requirement, the Commission was authorized to issue competing authority "only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission."[78] Thus, the 1921 act contained terms essentially identical to the dual entry restrictions now found in RCW 81.77.040.

When the Legislature adopted these requirements for solid waste in 1961 it was well understood that the "satisfactory service" requirement was more restrictive than the PCN standard alone. Even in 1921 the PCN standard required "an inquiry into whether there is a 'public need' for, or whether it would be in the public interest to authorize, the new or expanded services proposed by the applicant."[79] Under the PCN standard, the Legislature allowed the Commission to weigh competing evidence and decide if the proposed new service was in the public interest.

The 1921 act's "satisfactory service" requirement was contemporaneously understood to more restrictively limit the entry of new

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[76] *Davis & Banker, Inc. v. Nickell*, 126 Wash. 421, 423, 218 P. 198 (1923) (stating that adequate service requires investment, a return on investment, and that the certificate requirement was intended to protect a carrier from unlawful interference); *see also Horluck Transp. Co. v. Eckright*, 56 Wn.2d 218, 222, 352 P.2d 205 (1960) (same).
[77] Laws of 1921, ch. 111, § 4.
[78] *Id.*
[79] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 427 (1979).

service providers into territory already being served. In 1930, the Supreme Court upheld the denial of an application to provide passenger service between Seattle and Tacoma on a new highway parallel to an existing highway over which an established auto transportation company was already authorized to provide service.[80] The Supreme Court held that:

> [t]he Department of Public Works is not given unlimited power to grant certificates of convenience and necessity . . . to whomsoever it will regardless of existing conditions. On the contrary, its powers in this respect are governed by statute, and the statute (Laws of 1921, c. 111, § 4) expressly provides that it shall have power to grant a certificate in a territory already served by a certificate holder only when the existing certificate holder will not perform the service to the satisfaction of the department.[81]

Thus, the Supreme Court interpreted the "satisfactory service" requirement as distinct from and a restriction on the Commission's authority under the general PCN standard, and as requiring a separate determination that the existing carrier would not satisfactorily "perform" its services, indicating that the correct subject of the determination is the services actually being performed by the incumbent service provider.

The Supreme Court then found that the existing carrier's facilities were "ample and convenient" and allowed easy transfer to and from the Seattle-Tacoma route, that the company made on average 60 trips per day between those terminals, and that there was no formal complaint that

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[80] *N. Coast Transp. Co. v. Dep't of Pub. Works*, 157 Wash. 79, 80-81, 288 P. 245 (1930).
[81] *Id.* at 81.

existing service was inadequate.[82] The service details considered by the Supreme Court leave no doubt that it understood the "satisfactory service" evaluation to require an examination of the characteristics of the services provided by the existing carrier.

This holding is confirmed in other cases interpreting the "satisfactory service" requirement of the 1921 act. In *Yelton & McLaughlin v. Department of Public Works*, the Supreme Court reversed an administrative decision to authorize passenger service to a new mountain resort over a soon-to-be-completed road and to deny that authority to the company that already provided passenger service over an existing portion of the road.[83] The Court held that because there was no complaint about the existing service and the existing carrier was willing to provide service to the terminus of the completed road, under the "satisfactory service" requirement the existing carrier was entitled to "the certificate to the exclusion of anyone else. It is simply a statutory right which cannot be denied them under the evidence in this case."[84] Exclusive service is a "statutory right" that "cannot be denied" where the evidence does not demonstrate any deficiency in the service already being rendered.

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[82] *Id.* at 81-82.
[83] *Yelton & McLaughlin v. Dep't of Pub. Works*, 136 Wash. 445, 446-48, 240 P. 679 (1925).
[84] *Id.* at 446, 450-52. The statute also contained a grandfather provision, which allowed companies operating before 1921 to obtain a certificate. It was the satisfactory service provision, however, that conferred the right to "exclusive service." *Id.*

Likewise, in *Krakenberger v Department of Public Works*, the Supreme Court upheld the denial of an application to provide direct passenger service between Seattle and Hoquiam over intermediate routes served by a number of companies.[85] Although there was no existing direct service, there were also no complaints that the services of existing companies were inadequate.[86] The Court noted that existing carriers cooperated in selling and honoring "through" tickets, maintained sufficient and convenient schedules, and that close connections were possible.[87] This holding again demonstrates that the "satisfactory service" provision requires a finding that services provided by existing carriers are deficient.

ii. *The 1935 motor carrier act provided broad discretion to authorize competition regardless of existing service quality, until the Legislature rejected this regulatory scheme in RCW 81.77.040.*

In 1935 the Legislature passed a new law to regulate companies transporting property by motor carrier.[88] Solid waste collection companies were regulated under the 1935 act until chapter 81.77 RCW was enacted in 1961.[89] This history is informative because, when the 1961 Legislature chose the 1921 act's entry restrictions, it also chose not to continue the

[85] *Krakenberger v Dep't of Pub. Works*, 141 Wash. 168, 169, 250 P. 1088 (1926).
[86] *Id.*
[87] *Id.* at 170.
[88] Laws of 1935, ch. 184, § 2(c)-(f), 45 (passenger service continued to be regulated under the 1921 act).
[89] *See City Sanitary Serv*, 64 Wn.2d at 742.

1935 act's entry regulations, which did not require the Commission to consider the quality or sufficiency of existing carrier's services.

The 1935 act expressly eliminated the PCN standard, abolished existing certificates, and did not include a "satisfactory service" requirement.[90] Furthermore, the Legislature stated that "[n]othing contained in this act shall be construed to confer upon any person the exclusive right or privilege of transporting property for compensation . . . ."[91] Instead, the 1935 act, as amended,[92] gave the Commission broad authority to consider competitive conditions and authorize competent carriers without evaluating the adequacy of existing carriers' services.[93]

iii. *The 1961 solid waste statute rejected the 1935 act and adopted the strict entry restrictions of the 1921 act.*

In 1961 the Legislature consolidated the motor vehicle and other transportation statutes into Title 81 RCW.[94] In the same year, the Legislature enacted chapter 81.77 RCW to separately regulate solid waste

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[90] Laws of 1935, ch. 184, § 5.
[91] *Id.*
[92] Following amendments in 1937, 1941 and 1953, the Commission was permitted, though not required, to deny an application if it "would not be in the interest of the shipping public or would tend to impair the stability or dependability of existing service essential to the public needs or requirements." Laws of 1937, ch. 166, § 6; Laws of 1941, ch. 163, § 1; Laws of 1953, ch. 95, § 17.
[93] *Id.*; *see also* Comment, *Standards for the Granting of Motor Carrier Operating Authority*, 38 Wash. L. Rev. 465, 471 (1963) (concluding that under the 1935 motor carrier act, as amended, the Commission could consider a number of factors, including "the nature of competitive conditions existing at the time of the application . . . ," and had "wide discretion in the granting and denial of operating authority.").
[94] Laws of 1961, ch. 14 (*see* explanatory note).

collection companies.[95] The Legislature adopted both the PCN standard and the separate "satisfactory service" requirement of the 1921 act.[96]

The choice made by the 1961 Legislature leaves no doubt about its intent. The Legislature rejected the Commission's broad discretion under the 1935 act to issue competitive permits in the absence of any defect in existing services. Instead, the Legislature chose the restrictive "satisfactory service" requirement from the 1921 act, as understood and interpreted by the Supreme Court. In doing so, the Legislature intended the "satisfactory service" requirement to bar the Commission from authorizing competition unless the existing services were deficient in quality or ability to meet customers' service needs.

The Commission reinterpreted RCW 81.77.040 to relieve itself of the "satisfactory service" requirement adopted by the Legislature. The Commission's interpretation conflicts with the plain meaning and legislative intent of RCW 81.77.040 and must be reversed.

B. The Commission's Reversal of its Well-Established Interpretation of RCW 81.77.040 is not Based on Reasoned Analysis or Substantial Evidence and is Arbitrary and Capricious.

In addition to being erroneous as a matter of law and beyond the Commission's statutory authority, the Commission's new interpretation of

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[95] Laws of 1961, ch. 295, §§ 1-12.
[96] *Compare* RCW 81.77.040 (1961); Laws of 1961, ch. 295, § 5 *with* RCW 81.68.040 (1961).

RCW 81.77.040 in the Final Order reverses its well-established precedent. Even when acting within the scope of its statutory authority, the Commission may depart from its prior holdings only if it does so honestly and openly, based on a factual record and sound reasoning.

1. The Court must reverse the Commission's change to established precedent if it is not honestly acknowledged or not based on facts and sound reasoning.

Under the Washington Administrative Procedure Act (APA), a reviewing court must reverse an agency order if "[t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency," "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court," or "[t]he order is arbitrary or capricious."[97]

Since "[a]gencies may not treat similar situations in different ways," it is imperative that the Commission follows its established precedent or that any changes are adequately justified by facts and reasoned analysis.[98] Courts are specific that ". . . RCW 34.05.570(h) requires [an agency] to rule with consistency unless a rational basis for an

[97] RCW 34.05.570(3)(e), (h)-(i).
[98] *Seattle Area Plumbers v. Wash. State Apprenticeship and Training Council*, 131 Wn.App. 862, 879, 129 P.3d 838 (2006); *Vergeyle v. Emp't Sec. Dep't*, 28 Wn.App. 399, 404, 623 P.2d 736 (1981), *overruled on other grounds in Davis v. Emp't Sec. Dep't*, 108 Wn.2d 272, 276, 737 P.2d 1262 (1987).

inconsistency is demonstrated by an explanation of the facts and its reasoning."[99]

Likewise, under the federal APA, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . . ."[100] To do so, an agency must "display awareness that it is changing position."[101] An agency must "openly acknowledg[e] its intention to reverse course" and not "gloss over" its prior holdings.[102] An agency must provide a more detailed justification "when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters."[103]

In evaluating the factual basis for the Final Order, the Court's "factual review is confined to the record before the administrative law judge and [Commission]."[104] Any findings of fact are reviewed under the

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[99] *Seattle Area Plumbers*, 131 Wn.App. at 879; *see also Port of Seattle v. Pollution Control Hearings Bd,* 151 Wn.2d 568, 587-88, 90 P.3d 659 (2004) ("This court may also grant relief if the PCHB's order is inconsistent with an agency rule, unless the agency provides facts and reasons to demonstrate a rational basis for the inconsistency." (citing RCW 34.05.570(3)(h)).

[100] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856 (1983).

[101] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800 (2009); *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010).

[102] *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006) (citation omitted); *Modesto Irr. Dist.*, 619 F.3d at 1034 ("Courts will not 'assume [an agency] has engaged in reasoned decision making' when it 'implicitly' departs from its prior precedent and provides no explanation for doing so. (*quoting Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1091 (D.C. Cir. 2009)).

[103] *Fox Television Stations*, 556 U.S. at 515 (*citing Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730 (1996)); *Modesto Irr. Dist.*, 619 F.3d at 1034.

[104] *Brown v. Dep't of Soc. and Health Servs.*, 145 Wn.App. 177, 182, 185 P.3d 1210 (2008); *Tapper*, 122 Wn.2d at 402 ("An appellate court reviewing agency action "apply[ies] the standards of the WAPA directly to the record before the agency.").

substantial evidence test. "Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'"[105]

The Commission's reasoning, including any reasons asserted to explain its reversal of established precedent, "is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances."[106]

2. The Commission abandoned its well-established interpretation of RCW 81.77.040 without taking any evidence concerning the stated factual basis for its action.

As noted above, the Commission has long held that RCW 81.77.040 reflects a *legislative* preference for a "monopoly service" model and that the Legislature *intended* to restrict competition in enacting RCW 81.77.040.[107] Prior to the Final Order, the Commission has long followed a consistent interpretation and application of RCW 81.77.040's "satisfactory service" requirement in which: (1) "mere preference for competition does not demonstrate a need for an additional carrier" and duplicative or merely equivalent services will not be authorized;[108] (2) applicants seeking to provide competing solid waste service must make a

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[105] *Galvis v. Dep't of Transp.*, 140 Wn.App. 693, 708-09, 167 P.3d 584 (2007) (*quoting Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995)); *see also Brown*, 145 Wn.App. at 182 (The Court must "examine the record to determine if sufficient evidence exists to persuade a fair-minded person of the correctness of the order.").
[106] *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).
[107] *See supra*, note 17.
[108] *See supra*, note 20.

factual showing that the characteristics of existing solid waste services are deficient;[109] and, with respect to applications for overlapping biomedical waste authority, (3) there must be a factual showing that the existing carrier is not meeting biomedical waste generators' service needs.[110] Stericycle, Commission Staff, and the ALJ all agreed that these are essential elements of the Commission's prior precedent.[111]

In prehearing Order 05 the ALJ confirmed that the Commission's established precedent would be followed, holding that "[n]one of the Commission's decisions . . . can reasonably be interpreted to hold that a desire for competitive alternatives, without more, is sufficient to find that incumbent providers will not provide service to the satisfaction of the Commission."[112]

Based on this prehearing Order, Stericycle prosecuted its protest of Waste Management's application in accordance with the Commission's established precedent. Stericycle successfully defended against several allegations of minor billing and customer service errors that were offered with the intent of demonstrating unsatisfactory service under established standards. In the Initial Order, the ALJ found that "the billing and customer service issues" raised by some generators "do not support Waste

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[109] *See supra*, note 18.
[110] *See supra*, note 19.
[111] *See supra*, notes 23-27 and associated text.
[112] Order 05, ¶10 (AR: 1206).

Management's contentions."[113] The Final Order affirmed and adopted the Initial Order, including this finding.[114]

But the ALJ, and later the Commission, did not let the Commission's established precedent or any sense of fair play get in the way of the outcome they wanted to reach. The ALJ gave no notice prior to the hearing that he would disregard the established Commission precedent he previously held would govern the proceedings. The Initial Order did not even acknowledge the abandonment of the holdings of Order 05. The Commission did not seek to expand the evidentiary record, yet its Final Order affirmed the Initial Order on the basis of factual allegations about "the realities of the market," earlier "lack of experience" with competition in "former monopoly utility markets," newfound "greater experience and comfort with competition in certain utility markets," and the "highly competitive" nature of the biomedical waste collection industry.[115]

In short, the Commission did not provide Stericycle and the other parties, including the Commission Staff, an opportunity to present evidence relevant to the Commission's alleged factual basis for reinterpreting RCW 81.77.040 or the application of that new interpretation to the present case. Thus, the Commission did not create a factual record

[113] Initial Order 07, ¶9 (AR: 2072).
[114] Final Order 10, ¶5 (AR: 2258). This finding was not challenged on administrative review and is not at issue in this appeal.
[115] Final Order 10, ¶¶12-13, 15 (AR: 2263-64).

sufficient to support its radical change of position.[116] This is not agency "[a]ction taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration . . . ."[117] Without a colorable evidentiary basis for its change of position, the Commission's action was arbitrary and capricious.

3. The Commission's reversal of its consistent prior interpretation of RCW 81.77.040 is arbitrary and capricious because it was not honestly acknowledged or supported by substantial evidence and reasoned explanation.

The Commission's attempts to justify its radical reversal of established precedent are disingenuous, drawn solely from the Commission's imagination, and thus arbitrary and capricious. The Commission did not meet its responsibility of openly and honestly

[116] The Commission's failure to create a substantial evidentiary record stands in sharp contrast to its recent effort to liberalize competition in the auto transportation industry. In August, 2013 the Commission issued a final rule intended "to allow flexibility in setting rates and promote competition in the auto transportation industry." *In the Matter of Amending and Adopting Rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572, pp. 2-3, 9 (August 21, 2013). Before doing so, however, the Commission followed a rulemaking process, giving notice to interested parties, issuing draft proposed rules, accepting written comments, holding public workshops, issuing proposed rules, accepting further written comments, and holding a rulemaking hearing to receive comments and evidence. *Id.* at 2-8. Here, even though the Commission explicitly reverses well-established and substantial limitations on competition through its erroneous interpretation of RCW 81.77.040, it did so as a fait accompli and without evidence. This approach does not live up to the responsibilities of an administrative agency.

[117] *Heinmiller*, 127 Wn.2d at 609-10 (*citing State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983)); *Port of Seattle,* 151 Wn.2d at 589 ("Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the opposite conclusion.").

acknowledging its reversal of established precedent.[118] The Commission failed to "adequately justif[y]" this reversal with "facts and reasoned analysis."[119] This failure is egregious where, as here, an existing carrier has relied on the Commission's consistent recognition of RCW 81.77.040's limitations on competitive entry to build robust statewide services.[120] Decision making authority must be "exercised honestly and upon due consideration . . . ," but the Commission has done neither.[121]

In the Final Order, the Commission pretends that its new interpretation of RCW 81.77.040 to allow overlapping service solely because the Commission believes more competition would be "appropriate," "consistent with the public interest," or "effective" was actually consistent with its prior decisions. In an introductory paragraph

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[118] *See* RCW 34.05.570(3)(h) (agencies must "stat[e] facts and reasons" for a change in law); *Port of Seattle,* 151 Wn.2d at 587-88 (agency must act "honestly" and "upon due consideration"); *Heinmiller*, 127 Wn.2d at 609-10 (same); *see also Fox Television Stations*, 556 U.S. at 515 (agency must "display awareness that it is changing position."); *Modesto Irr. Dist.*, 619 F.3d at 1034 (same); *Williams Gas Processing*, 475 F.3d at 329 (agency must "openly acknowledg[e] its intention to reverse course.").

[119] *Seattle Area Plumbers*, 131 Wn.App. at 879; *see also* RCW 34.05.570(3)(h)-(i).

[120] Stericycle's certificate authority is a property interest. AGO 1966 No. 78 (providing that solid waste certificate authority is "a property right"); *see also Horluck Transp.*, 56 Wn.2d at 222 (an auto transportation certificate is a "property right"); *Davis & Banker*, 126 Wash at 423 (granting certificate "was in the nature of a limited franchise."). On the basis of this property interest, Stericycle built an extensive transportation network involving 30 service vehicles, five transportation hubs, and a modern waste treatment facility and has grown to serve over 7,700 of the state's approximately 8,000 customers. MP-1T, ¶¶25-34 (AR: 3363-67) (describing transportation network); MAW-9, p.5 (AR: 2452) (Stericycle 2011 Annual Report, indicating 7,713 customers); Transcript, 368:4-19 (estimating the number of biomedical waste generators). It is undisputed that Stericycle may lose up to one-third of its current and prospective business as a result of the Commission's decision. *See* MAW-1T, p.13 (AR: 2356) (predicting that Waste Management will capture one third of the biomedical waste market by 2015); MAW-13 (AR: 2465) (presenting one-third market share model).

[121] *Heinmiller*, 127 Wn.2d at 609-10.

stating its conclusions, the Commission accepts that it must address the contention that the Initial Order "is contrary to the language and long-standing Commission interpretation of RCW 81.77.04 . . . ."[122] However, the Commission does not truthfully state that it is changing its long-standing interpretation of the statute. Rather, the Commission disingenuously asserts that the Initial Order "properly reflects the intent of prior Commission decisions . . . ."[123] Similarly, the Commission specifically rejects the consensus conclusion of Stericycle, the Commission Staff, and the ALJ that the Commission "has consistently refused to grant competitive entry without 'a factual showing that the services provided by existing certificated carriers are insufficient to meet the specialized needs of biomedical waste generators.'"[124] Instead of forthrightly explaining its abandonment of this precedent, the Commission dances around the point, stating only that "the Commission is not as constrained as Stericycle and WRRA assert."[125] Finally, referring to its

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[122] Final Order 10, ¶5 (AR: 2259-60).
[123] *Id.*
[124] *Id.*, ¶9 (AR: 2261-62) (*quoting* Stericycle Petition for Administrative Review, ¶47).
[125] *Id.* The Commission's attempt at obfuscation is further revealed by its patently inaccurate statement that Commission "'policy has historically encouraged competition' in the context of biomedical waste collection." *Id.*, ¶10 (AR:2263). This statement is a gross exaggeration of dicta from a 1990 case that simply recognized the possibility that that in the future the Commission could authorize additional statewide service under the statute, not a statement of pro-competition policy. *See id.*, ¶10 (AR: 2263) (*citing Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Motions for Dismissal and Summary Determination, p.16, ¶37 (July 13, 2011), which in turn relied on *Sure-Way Incineration*, Order M.V.G. No. 1451, pp.16-17 (concluding that "[t]he Commission is not ready to say that a grant of one application for statewide authority would preclude a grant of others, and will consider this element in

decision to allow overlapping service based solely on generator preference for competition, the Commission again dissembles, explaining that "[w]e view this conclusion as less of a change to the Commission's determinations two decades ago than as an adaptation of regulation to the realities of the market."[126] Asserting that it is simply not "constrained" by its own well-established interpretation and application of RCW 81.77.040 and characterizing a decision rejecting the reasoning of its prior precedents as actually "reflect[ing] the intent" of those decisions – not a "change" but merely an "adaptation of regulation" to current conditions – is not the "awareness" or "honest[]" action "upon due consideration" required of an administrative agency changing its interpretation of a governing statute.[127]

The Commission's attempt at obfuscation is not harmless. Pretending that the Final Order is consistent with the Commission's prior precedent allows the Commission to shirk its obligation to justify its change of course with the support of record evidence and cogent reasoning. This is arbitrary and capricious.

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future proceedings.")). At any rate, this alleged policy encouraging competition would clearly have been short lived as it was rejected by the Commission in its subsequent 1993 holding that preference for competition does not demonstrate unsatisfactory service, its statements rejecting duplicative and equivalent services in 1990 and 1993, and its recent 2010 Report to the Legislature, recognizing the Legislature's superseding intent to prevent competition. *See supra* notes 19-20; 2010 Report to the Legislature, p.11.

[126] Final Order 10, ¶15 (AR: 2264). As discussed below, the Commission's vague reference to "the realities of the market" is entirely unsupported by any reference to evidence in the record.

[127] *See supra* note 118.

The sole substantive reason given by the Commission for its change in course is not supported by *any* evidence in the administrative record, is based on vague assertions with no cogent relationship to the Commission's action, does not address record evidence or the history of solid waste regulation, and, therefore, fails to satisfy the APA requirements governing agency action.

In the Final Order the Commission "observe[d]" that "the development of competition in former monopoly utility markets was only just beginning in Washington in the late 1980's and early 1990's" when its early biomedical waste cases were decided.[128] According to the Final Order:

> [d]ue to a lack of experience with the impacts of allowing more than one company to provide service, the Commission was properly cautious and limited competitive entry to demonstrated instances in which multiple providers would serve consistent with the public interest. The Commission thus required that a new entrant in the biomedical waste collection market be willing and able to provide service that was not being provided . . . .[129]

Now, the Commission alleges, it:

> has greater experience and comfort with competition in certain utility markets. Biomedical waste collection "has evolved into a highly competitive industry as a result of the Commission interpreting RCW 81.77.040 consistently with the unique requirements and attributes of the service."[130]

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[128] Final Order 10, ¶12 (AR: 2263).
[129] *Id.*
[130] *Id.*, ¶13 (*citing In re Petition of Staff for a Declaratory Ruling*, Docket TG-970532, Declaratory Order, p.11 (Aug.14, 1998)) (AR: 2264).

These assertions are wholly unsupported by evidence in the record. The Final Order contains no specific findings of fact at all. The Initial Order, whose findings of fact were adopted in the Final Order, contains no findings of fact related in any way to the Commission's past or present experience with competition in any industry or to the competitive characteristics of any industry. The Commission cites no evidence to support any of its musings about competition. In short, although the Commission's claims are asserted as facts explaining its sharp departure from precedent, they are based on no evidence, let alone substantial evidence, that could convince a fair-minded person that the Commission's assertions are true.[131] The Commission has failed to explain its reasons for changing the law with facts based on record evidence or with any reasoned analysis based on facts.

The Commission's explanation is vague, evasive, contradictory, and at odds with evidence in the administrative record and the history of solid waste regulation. In short, it is "willful and unreasoning and taken without regard to the attending facts or circumstances."[132]

The Commission does not name or discuss in any way the "former monopoly utility markets" in which it claims a previous lack of experience or the "certain utility markets" in which it now allegedly has "greater

[131] *Heinmiller*, 127 Wn.2d at 607; *Galvis*, 140 Wn.App. at 708-09.
[132] *Hillis*, 131 Wn.2d at 383.

experience and comfort with competition."[133] The Commission does not explain in any way the nature of its "experience" or any basis for asserting its new-found "comfort" with competition. Yet, the Commission asks this Court to accept that its undisclosed "experience" with these mystery industries justifies its actions. This cannot be accepted. "Whatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."[134] As a result of the Commission's obfuscation, it is impossible for this Court to understand or evaluate its assertions or to determine whether they have any rational relationship to the Commission's reinterpretation of the solid waste statute.

As if to further highlight the illogic of its rationale, the Commission appears to claim that its decision is supported by the further assertion that biomedical waste collection is "a highly competitive

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[133] Final Order 10, ¶¶12-13 (AR: 2263-64). These "markets" certainly cannot be the telecommunications or commercial ferry industries. The Initial Order advanced an (equally unsupported) argument that made reference to Washington's local telecommunications and commercial ferry industries. Initial Order 07, ¶11 (AR: 2073). In the Final Order, however, the Commission specifically disclaimed any reliance on the competitive circumstances of these industries, or statutes and decisions in any "other industries," so that it could avoid addressing contrary arguments. Final Order 10, ¶15, n.27 ("The Commission bases its determination in this proceeding on its interpretation of the applicable statute and the record evidence, and thus we need not address the protestant's views on the applicability of statutes and Commission decisions rendered in the context of other industries.") (AR: 2265).

[134] *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367 (1973).

industry."[135] But this claim clearly cannot justify the Commission's decision to reverse its established interpretation of RCW 81.77.040. The Commission reversed its established interpretation so that it could authorize new service to satisfy an allegedly *unmet* "need" for competition. But the Commission nowhere explains why this action is justified by the *already* "highly competitive" marketplace. Nor does the Commission provide any explanation for why it would upend the very legal regime that apparently fostered such robust competition, let alone for the nonsensical purpose of allowing competition. The Commission does not even attempt to engage with or explain this contradiction.

The Commission's tangled logic is perhaps the result of again relying on a bald assertion that is wholly without substance. The Commission cites no finding of fact or record evidence for its assertion that biomedical waste collection is "highly competitive" and ignores record evidence that demonstrates limited competition in biomedical waste collection, as the Legislature intended.[136] Where the Commission relies on nonsensical reasoning and disregards relevant facts it acts arbitrarily and

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[135] Final Order, ¶13 (AR: 2264).

[136] To make this claim, the Commission nonsensically relies exclusively on a 14 year-old decision. *Id.*, ¶13, n.23 (*citing Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order, p. 11 (Aug. 14, 1998)). The record demonstrates that in 1999 Stericycle became the only statewide biomedical provider and now serves over 7,700 of the state's approximately 8,000 customers. MP-15T, ¶¶2, 4, 7 (AR: 3432-34); MAW-9, p.5 (AR: 2452) (Stericycle 2011 Annual Report, indicating 7,713 customers); Transcript, 368:4-19 (approximating the number of biomedical waste generators). Waste Management has between 181 and approximately 250 biomedical waste customers. MAW-22, p.12 (AR: 2516) (Waste Management 2011 Annual Report, indicating 181 customers); Transcript, 368:14-21 (approximating 250 Waste Management customers).

capriciously.[137] The Commission's argument is devoid of any factual or substantive content sufficient to constitute a "rational basis" for its reinterpretation of RCW 81.77.040.[138]

Finally, the Commission's argument is also at odds with the history of solid waste regulation. The Commission alleges that it was cautious and formerly limited competition "[d]ue to a lack of experience with the impacts of allowing more than one company to provide service."[139] This is nonsense. The Commission's prior biomedical waste cases clearly acknowledge the Legislature's intent to limit competition in solid waste collection.[140] As these cases make clear, this legislative intent was the source of the Commission's "caution" in authorizing competition only upon a showing that existing services were in some way deficient.[141] The Commission disingenuously disregards this legislative history in positing a fictitious basis for its original interpretation of RCW 81.77.040 and its equally fictitious basis for abandoning that interpretation.

C. To Hold that Stericycle Will Not Provide "Satisfactory Service," the Commission Improperly Assumes a "Need" for Competition that will Benefit Generators Without Substantial Evidence or Sound Reasoning.

After erroneously interpreting RCW 81.77.040 and improperly reversing established precedent, the Commission held that Stericycle

[137] *See Hillis*, 131 Wn.2d at 383.
[138] RCW 34.05.570(3)(h).
[139] Final Order 10, ¶12 (AR: 2263).
[140] *See supra*, note 17.
[141] *See supra*, notes 17, 19-20.

would not provide "satisfactory service" in the territory covered by Waste Management's application because of an alleged "need" of generators for additional competition in that territory.[142] This holding merely redefines the requirement of a "need" for overlapping service to precisely fit the Commission's conclusion that generators generally would benefit from additional competition. In other words, the Commission simply invents a "need" for the result it wanted to reach, contrary to the Legislature's intent to limit competition.

Seven generators expressed a general preference for a competitive alternative to Stericycle, not a "need" for another service provider based on any inadequacy of Stericycle's service to meet their service needs.[143] Five of these generators specifically testified that their desire for competition was generic—a desire for competition for competition's sake.[144] In fact, most of these generators stated that they wanted competition in the hope that it would result in lower prices.[145] The Commission, therefore, merely redefined the requirement of the "satisfactory service" test for an unmet service need by inventing a broad "need" for competition.[146]

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[142] Final Order 10, ¶16 (AR: 2265).
[143] *See supra,* note 30. *See also* Final Order 10, ¶16, n.28 (AR: 2265).
[144] *See supra,* note 31.
[145] Final Order 10, ¶23, n.40 (AR: 2268).
[146] It is arbitrary and capricious for the Commission to rely on generators' desire for lower rates. In unchallenged precedent the Commission has long held that rates are not a factor in determining whether service is satisfactory. *In re SnoKing Garbage Co./R.S.T.*

The Commission simply assumed that this competition would benefit generators in the new service territory sought by Waste Management without any study or analysis, based solely on the self-serving testimony of a single Waste Management witness – who testified that Stericycle responded to Waste Management's entry into biomedical waste collection within its existing service territory by adding one particular style of collection container at prices that matched Waste Management at certain volumes.[147]

It was arbitrary and capricious for the Commission to rely on this self-serving applicant testimony in its "satisfactory service" evaluation. Under Commission precedent that was not contested in the Final Order, the evaluation of generator need under the "satisfactory service" requirement must be based on the testimony of generators in the application territory, not testimony of the applicant's personnel.[148]

Disposal Serv., Inc., Order M.V.G. No. 1185, p.6, App. No. GA-788 (Nov. 6, 1984) (holding that the "level of rates is not a proper inquiry in determining whether authority should be granted . . . ."); *R.S.T. Disposal*, Order M.V.G. No. 1402, p.37 ("The proposed order correctly declined to consider rates as an evaluative element."). Keeping rates out of the "satisfactory service" analysis is consistent with the statute because rates can be changed at any time and are not a characteristic of existing service and because the Commission is charged with directly regulating rates to ensure they are just and reasonable. *R.S.T. Disposal*, Order M.V.G. No. 1402, p.37; RCW 81.77.030 (authorizing the Commission to fix and alter the rates of solid waste collection companies); RCW 81.04.250 (authorizing the Commission to prescribe "just and reasonable rates").

[147] *See* Final Order 10, ¶23 (AR: 2268); JN-1T, p.4 (AR: 2735). The Commission relies on only one conclusory finding of fact—that "[Waste Management] has demonstrated the consumer need for, and positive results from, its expansion into the statewide bio-hazardous collection services market." Initial Order 07, ¶30 (emphasis added) (AR: 2079); Final Order 10, ¶5 (AR: 2258) (adopting Initial Order's findings of fact).

[148] *Sureway Med. Serv*, Order M.V.G. No. 1674, p.5, n.3 ("The Commission requires that need be shown through the testimony of persons who require the service."). The

Further, the Commission simply assumed without substantial evidence that Stericycle's minimal competitive response to Waste Management within Waste Management's existing service territory demonstrated that generators would benefit generally from additional competition in the new service territory. There is zero record evidence that either the new container style or limited price matching was significant to generators. No generator mentioned the new container in its testimony before the Commission. No generator testified that it wanted or needed *any* new style of container. On the contrary, the record shows that Stericycle has long offered its customers a wide choice among several styles of containers, which a Waste Management witness agreed provides a *superior* benefit to customers than the single container style offered by Waste Management.[149] The Commission does not address this evidence. No generator testified that the limited price matching on some volumes of this new container style was significant to them. There is simply no evidence to support the Commission's claim that generators have

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Commission alleges that this applicant testimony is not related to the so-called "need" for competition, but rather that it only demonstrates that Waste Management will meet this "need." Final Order 10, ¶23, n.11. If the Commission admits that the Waste Management testimony is unrelated to demonstrating an unmet generator need, it is arbitrary and capricious to rely on that evidence to find that Stericycle's existing services are unsatisfactory.

[149] MP-1T, ¶17 (AR: 3361); MP-3 (AR: 3383) (listing Stericycle's containers); MP-15T, ¶¶26-27, 37 (AR: 3441-42, 46) (demonstrating agreement that customers value a choice of containers); Transcript, 371:21-372:11, 374:10-375:17, 376:8-377:25 (Waste Management testimony showing that Waste Management offers one kind of container, that customers value a choice of containers, and that a choice of containers provides better service).

benefited from Waste Management's competition within its existing service territory – nor the Commission's conclusion that generators generally would benefit from such competition in the new territory.

The Commission fails to offer any reasoned basis for its implicit conclusion that these alleged "benefits" in Waste Management's *existing* territory would translate into a general consumer benefit in the *new*, more rural, territory covered by Waste Management's application. Indeed, the Final Order did not consider the testimony from the Association of Public Hospital Districts expressing concern that dividing rural service between two (or more) carriers could raise the costs of delivering those services, forcing carriers to increase prices or cut back services.[150] In light of these concerns about the potential negative effects of competition, the Commission's claim that generators "need" competition in the territory covered by Waste Management's application because it might yield "benefits" like a single new container style that no generator wants or minor price matching that no generator values is unsupported and built on insubstantial analysis.

Rather than relying on evidence of an actual service need, the Commission has simply relied on a generic preference for lower prices

[150]JM-1T, ¶12 (AR: 4173). There is no dispute that serving customers farther from transportation hubs involves relatively greater fixed costs and that decreased business in those areas will further increase costs relative to revenue. *See* CD-1T, ¶8 (Stericycle witness discussing effect of decreased business in Port Angeles) (AR: 4150); Transcript, 276:9-278:11 (same, by Waste Management witness).

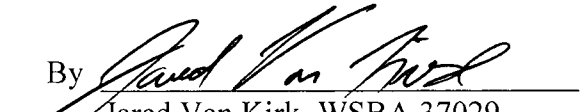
and the self-serving testimony of Waste Management to redefine "need" to meet the Commission's preconceived determination that biomedical waste collection should be opened to competition. This so-called "need" cannot justify finding that Stericycle's existing services are unsatisfactory under RCW 81.77.040. The Commission's Final Order is an arbitrary and capricious abuse of its statutory authority.

V. CONCLUSION

The Commission's new interpretation RCW 81.77.040 is erroneous as a matter of law. It improperly reverses well established precedent without honest and reasoned explanation based on facts in the record. The Commission's Final Order granting Waste Management's application is unsupported by substantial evidence in the record and is arbitrary and capricious. In unchallenged findings, the Commission found that Stericycle's services were not deficient under established precedent. The Court should reverse the Final Order and remand to the Commission with instructions to deny Waste Management's application.

DATED this 4th day of August, 2014.

GARVEY SCHUBERT BARER

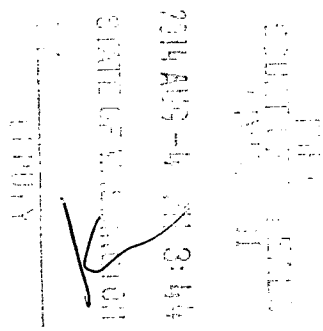
By 

Jared Van Kirk, WSBA 37029
Stephen B. Johnson, WSBA 6196
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury that, on August 4, 2014, I caused the OPENING BRIEF to be served on the persons identified below via email:

Jennifer Cameron-Rulkowski
Assistant Attorney General,
Office of the Attorney General
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183
jcameron@utc.wa.gov
bdeMarco@utc.wa.gov



Polly L. McNeill
Jessica L. Goldman
Summit Law Group PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682
Email: jessicag@summitlaw.com
Email: pollym@summitlaw.com
Email: katiea@summitlaw.com
Attorneys for Waste Management of Washington, Inc.

DATED this 4th day of August, 2014.

Dominique Barrientes
Legal Assistant to Jared Van Kirk

Appendix A

C

Effective: July 1, 2010

West's Revised Code of Washington Annotated Currentness
Title 81. Transportation (Refs & Annos)
Chapter 81.77. Solid Waste Collection Companies (Refs & Annos)

➡➡ 81.77.040. Certificate of convenience and necessity required--Issuance--Transferability--Solid waste categories

A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. Operating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service. To operate a solid waste collection company in the unincorporated areas of a county, the company must comply with the solid waste management plan prepared under chapter 70.95 RCW in the company's franchise area.

Issuance of the certificate of necessity must be determined on, but not limited to, the following factors: The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of prior experience, if any, in such field by the petitioner, set out in an affidavit or declaration; and sentiment in the community contemplated to be served as to the necessity for such a service.

When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after notice and an opportunity for a hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.

In all other cases, the commission may, with or without hearing, issue certificates, or for good cause shown refuse to issue them, or issue them for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted such terms and conditions as, in its judgment, the public convenience and necessity may require.

Any right, privilege, certificate held, owned, or obtained by a solid waste collection company may be sold, assigned, leased, transferred, or inherited as other property, only if authorized by the commission.

For purposes of issuing certificates under this chapter, the commission may adopt categories of solid wastes as follows: Garbage, refuse, recyclable materials, and demolition debris. A certificate may be issued for one or more categories of solid waste. Certificates issued on or before July 23, 1989, shall not be expanded or restricted by operation of this chapter.

CREDIT(S)

[2010 c 24 § 1, eff. July 1, 2010; 2007 c 234 § 66, eff. July 22, 2007; 2005 c 121 § 6, eff. July 24, 2005; 1989 c 431 § 21; 1987 c 239 § 2; 1961 c 295 § 5.]

<(Formerly: Garbage and Refuse Collection Companies)>

HISTORICAL AND STATUTORY NOTES

Effective date--2010 c 24: "This act takes effect July 1, 2010." [2010 c 24 § 3.]

LIBRARY REFERENCES

Automobiles 77.
Westlaw Topic No. 48A.
C.J.S. Motor Vehicles § 82 et seq.

RESEARCH REFERENCES

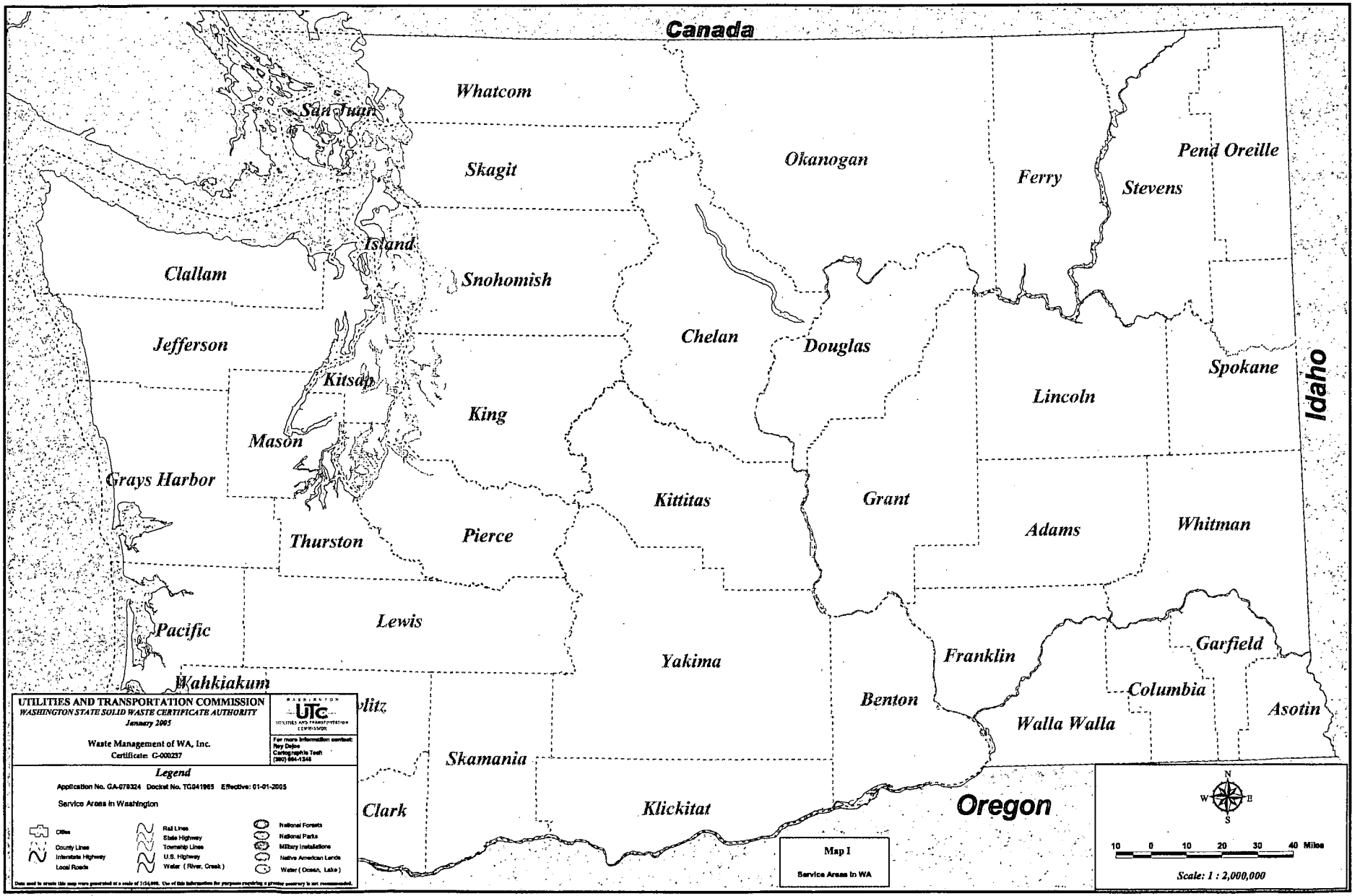
Treatises and Practice Aids

23 Wash. Prac. Series § 13.22, Role of the Washington Utilities and Transportation Commission.

NOTES OF DECISIONS

1. Validity

Appendix B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Lewis
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Yakima
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Garfield
Wahkiakum
Columbia
Benton
Asotin
Walla Walla
Skamania
Clark
Klickitat
Oregon
UTILITIES AND TRANSPORTATION COMMISSION
WASHINGTON STATE SOLID WASTE CERTIFICATE AUTHORITY
January 2005
Waste Management of WA, Inc.
Certificate G-000237
Legend
Application No. GA-079324 Docket No. TG041965 Effective: 01-01-2005
Service Areas in Washington
Cities
County Lines
Interstate Highway
Local Roads
Rail Lines
State Highway
Township Lines
U.S. Highway
Water (River, Creek)
National Forests
National Parks
Military Installations
Native American Lands
Water (Ocean, Lake)
Map 1
Service Areas in WA
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10 0 10 20 30 40 Miles
Scale: 1 : 2,000,000